Citec International Sdn Bhd v Yeam Sai Meng

HIGH COURT (KUALA LUMPUR) — SUIT NO S7–22–187 OF 2003
AZMAN ABDULLAH JC
18 JANUARY 2008

Civil Procedure — Summary judgment — Triable issues — Whether raised — Whether monies were utilised by defendant with approval and knowledge of managing director of plaintiff's company — Whether withdrawn monies utilised according to instruction of managing director — Rules of the High Court 1980 O 14

The defendant was appealing against the decision of the learned deputy registrar of the High Court which had allowed the plaintiff's application to enter summary judgment against the defendant with costs under O 14 of the Rules of the High Court 1980. In the said action, the summary judgment granted in favour of the plaintiff was based upon the plaintiff's claims against the defendant, the executive director in the plaintiff's company at the material time, for breach of fiduciary duty by transferring a sum of RM1,262,324.92 belonging to the plaintiff to his own personal account and further, had cashed and/or utilised the monies for other purposes other than for payment of the plaintiff's taxes. The defendant however, contended that the said monies utilised by the defendant was approved and known to Terrence Lee, the managing director of the plaintiff's company. The defendant further contended that he had withdrawn the said monies upon Terrence Lee's instruction and that part of the said withdrawn monies were utilised according to Terrence Lee's instructions for the purpose of his personal use. As the issues raised had to be further investigated and constituted substantial questions of fact, the defendant contended that this case was not suitable to be decided summarily. The defendant therefore, submitted that leave ought to be granted to defend this action as substantial questions of facts had been raised that needed to be tried in a full trial.

Held, dismissing the defendant's appeal with costs:

(1) It is trite law that there are several requirements that need to be fulfilled prior to allowing an order of summary judgment as was held by the Federal Court in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300. In the present case, the plaintiff had fulfilled

the said prima facie requirements. The issues raised by the defendant herein were not triable issues or a good arguable defence that ought to be tried (see paras 20–21).

(2) The defendant's allegations against the plaintiff namely, that the plaintiff did authorise, ratify and approve the misappropriation of monies wrongfully encashed by the defendant for different purposes other than their original purpose were not substantiated with evidence (see para 22).

(3) Further, it was unreasonable to allege that the plaintiff would approve and authorise, ratify or agree to something which does not in any way benefit the plaintiff but in fact would expose the plaintiff to the risk of being fined by the Customs Department (see para 23).

(4) In addition, Terrence Lee and the plaintiff company were separate legal entities of one another. Thus, the defendant's contention that Terrence Lee had knowledge of the defendant's actions and authorised or approved such payments was not relevant for this court to consider. Even though Terrence Lee had knowledge being the director of the plaintiff company, this could not be imputed to the plaintiff. In fact, the defendant had breached his fiduciary duties as a director in the plaintiff company and had caused conflict of interest in the course of the plaintiff's businesses (see para 24–25 & 29).

[Bahasa Malaysia summary

Defendan merayu terhadap keputusan timbalan pendaftar Mahkamah Tinggi yang telah membenarkan permohonan plaintif untuk memasukkan penghakiman terus terhadap defendan dengan kos di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Dalam tindakan tersebut, penghakiman terus telah diberikan kepada plaintif berdasarkan kepada tuntutan plaintif terhadap defendan, pengarah eksekutif di dalam syarikat plaintif ketika masa yang material, bagi kemungkiran tanggungjawab fidusiari dengan memindahkan sejumlah RM1,262,324.92 kepunyaan plaintif ke akaun persendiriannya dan selanjutnya telah menunaikan dan/atau menggunakan wang tersebut untuk tujuan selain daripada pembayaran cukai plaintif. Walau bagaimanapun, defendan menegaskan bahawa wang tersebut yang digunakan oleh defendan telah diluluskan dan diketahui oleh Terrence Lee, pengarah urusan syarikat plaintif. Defendan selanjutnya menegaskan bahawa beliau telah mengeluarkan wang tersebut berdasarkan arahan Terrence Lee dan sebahagian daripada wang yang dikeluarkan telah digunakan berdasarkan arahan Terrence Lee bagi tujuan kegunaannya sendiri. Oleh kerana isu yang dibangkitkan perlu siasatan yang lebih lanjut dan menyebabkan persoalan fakta yang penting, defendan menegaskan bahawa kes ini tidak sesuai diputuskan secara terus. Oleh itu, defendan

menghujahkan bahawa kebenaran seharusnya diberikan untuk membela tindakan ini sebagaimana persoalan fakta yang penting telah ditimbulkan tersebut perlu dibicarakan di dalam perbicaraan penuh.

Diputuskan, menolak rayuan defendan dengan kos:

(1) Adalah undang-undang yang mantap bahawa terdapat beberapa syarat yang perlu dipenuhi sebelum satu perintah untuk penghakiman penuh seperti mana yang diputuskan oleh Mahkamah Persekutuan di dalam *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300. Dalam kes ini, plaintif telah memenuhi syarat-syarat prima facie tersebut. Isu yang ditimbulkan oleh defendan di sini bukanlah isu-isu yang perlu dibicarakan atau satu pembelaan yang baik untuk dibicarakan (lihat perenggan 20–21).

(2) Dakwaan defendan terhadap plaintif iaitu, plaintif telah memberikan kebenaran, meratifikasikan dan meluluskan penyalahgunaan wang ditunaikan secara salah oleh defendan untuk tujuan yang berbeza selain daripada tujuan asal mereka adalah tidak disokong dengan keterangan (lihat perenggan 22).

(3) Selanjutnya, adalah tidak munasabah untuk mendakwa bahawa plaintif telah meluluskan dan membenarkan, meratifikasi atau bersetuju kepada sesuatu yang tidak memberikan keuntungan kepada plaintif tetapi yang mendedahkan plaintif terhadap risiko yang boleh didenda oleh Jabatan Kastam (lihat perenggan 23).

(4) Tambahan pula, Terrence Lee dan syarikat plaintif adalah entiti sah yang berlainan. Oleh itu, penegasan defendan bahawa Terrence Lee mengetahui tindakan defendan dan membenarkan atau meluluskan pembayaran tersebut adalah tidak relevan untuk pertimbangan mahkamah ini. Walaupun, Terrence Lee mempunyai pengetahuan memandangkan dia pengarah syarikat plaintif, ini tidak boleh dikatakan telah disebabkan oleh plaintif. Sesungguhnya, defendan telah melanggar tanggungjawab fidusiarinya sebagai pengarah dalam syarikat plaintif dan telah menyebabkan konflik kepentingan di dalam perniagaan plaintif (lihat perenggan 24–25 & 29).]

Notes

For cases on triable issues, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7442–7540.

Cases referred to

Belmont Finance Corp Ltd v William Furniture Ltd [1979] 1 All ER 119 (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Rex v Tay Thye Joo [1933] MLJ 35 (refd)
Syarikat Kerjasama Tunas Muda Sungai Ara v Ghazali bin Ibrahim [1985] 2 MLJ 225 (refd)

Legislation referred to
Rules of the High Court 1980 O14, O 14 r 1

Cindy Goh (Cheang & Ariff) for the plaintiff.
Joseph Yeo (Joseph Yeo) for the defendant.

Azman Abdullah JC:

INTRODUCTION

[1] By a notice of appeal dated 24 October 2005, the defendant appealed against the decision given by the learned deputy registrar of the High Court dated 24 October 2005 allowing the plaintiff's application to enter summary judgment against the defendant with costs under O 14 of the Rules of the High Court 1980.

[2] In this action, the summary judgment granted in favour of the respondent is based upon the plaintiff's claims to the defendant that is the executive director in the plaintiff's company at the material time for breach of fiduciary duty by transferring a sum of RM1,262,324.92 belonging to the plaintiff to his own personal account and cashed or/and utilised the monies for other purposes other than for payment of the plaintiff's taxes.

BACKGROUND

[3] The background of this matter is the following. The plaintiff is a company carrying on business as manufacturers of close control air-conditioning equipment, a technology product licensed by the Ministry of International Trade and Industry and the defendant is the executive director in the plaintiff's company until 21 February 2003.

[4] In this case, the products manufactured by the plaintiff sold in the domestic market are subject to sales tax and custom duties whereas the products sold in the international market are not subject to such taxes and duties.

[5] The disputes arose between the appellant and the respondent herein are pertaining to the plaintiff's monies a sum of RM1,262,324,92 supposed to be utilised solely for the purpose of paying plaintiff's customs duties and sales taxes which were taken away by the defendant and utilised for other purposes.

[6] The plaintiff alleged that based on the internal audit work it was found that from the Customs declaration forms issued by the defendant for the period December 2000 to November 2001, whereby the defendant as the director in the plaintiff's company had falsely declared to the Customs and Excise Department that there were no local sales made and as such, customs duties were not payable whereas in fact, a sum of RM1.2m were already taken away by the defendant from the plaintiff's account supposedly to be utilised for paying the said customs duties.

[7] In this matter, the plaintiff alleged that the said declarations are false because a sum of RM755,07.23 were paid to the defendant for paying domestic duties in the same period and within 1 January 1999 until 18 November 2001 a sum of RM1,262,324.92 were taken away by the defendant at all material times for the purpose of paying customs duties and sale taxes payable by the plaintiff.

[8] The plaintiff alleged that the defendant had deposited into the bank the plaintiff's said taken monies into the defendant's own personal account. The defendant then had withdrawn the monies from the defendant's account and encashed the said monies from the defendant's account over the bank's counter without the plaintiff's knowledge and without obtaining consent and/or approval from the plaintiff.

[9] As such, the plaintiff alleged that the defendant's actions had caused disruption in the course of plaintiff's businesses and consequently the plaintiff suffered losses. Hence, the plaintiff seeks to the court orders as follows:

(i) that the defendant whether by himself, his servants, agents, nominees or howsoever otherwise be required and an injunction be hereby issued to require the defendant whether by himself, his servants, agents, nominees or howsoever otherwise to return all documents, accounts and assets of the plaintiff including, inter alia, the company car and the computer notebook containing private and other documents containing confidential information of the plaintiff with immediate effect;

(ii) that the defendant whether by himself, his servants, agents, nominees or howsoever otherwise be restrained and an injunction be hereby issued to restrain the defendant whether by himself, his servants, agents,

nominees or howsoever otherwise from entering the premises of the plaintiff without permission of the board of directors of the plaintiff;

(iii) that the defendant whether by himself, his servants, agents, nominees or howsoever otherwise be restrained and an injunction be hereby issued to restrain the defendant whether by himself, his servants, agents, nominees or howsoever otherwise from continue to hold himself out as a director of the plaintiff and effecting any further instructions on behalf of the plaintiff;

(iv) declaration that the defendant acted in breach of his fiduciary duties when he removed all the company's properties from the premises of the plaintiff's company for the purposes of obstructing the plaintiff's right of possession and access to the property;

(v) that the defendant shall forthwith make restitution to the plaintiff of the sum of RM1,262,324,92;

(vi) that the defendant shall indemnify and hold the plaintiff safe and harmless against any action or proceedings which may be taken by the relevant authorities against the plaintiff in relation to the false declaration made by the defendant personally and in relation to the non-payment of customs duty brought about by the defendant's misappropriation of the plaintiff's money, including any loss which might be suffered by the plaintiff arising from cancellation or the impositions of restrictions against the plaintiff's business by the relevant authorities;

(vii) general damages to be assessed by this honourable court with respect to the breach of fiduciary duties by the defendant; and

(viii) exemplary damages for the seriousness of the breaches of the fiduciary duties on the part of the defendant and for making false declarations such as to affect the reputation of the company.

[10] In the submissions, the defendant submitted that leave ought to be given to the defendant to defend this action wherein the defendant had raised substantial questions of facts that needed to be tried in a full trial, inter alia, the payment and the said monies utilised by the defendant were approved and known by Lee Kwok Kee, Terrence ('Terrence Lee') that is the managing director in the plaintiff's company.

[11] Other than that, the defendant also submitted that the defendant had withdrawn the said monies upon Terrence Lee's instructions. In para 9.3 defendant's affidavit in reply filed on 16 May 2003, the defendant stated that all the declarations to the Customs pertaining to the local sales were based upon 'Terrence Lee' instructions.

[12] In the same affidavit at para 9.5, the defendant stated that part of the said withdrawn monies were utilised according to Terrence Lee instructions for the purpose of his personal use.

[13] According to the defendant, since the raised issues must be further investigated and constituted substantial questions of facts thus this case is not suitable to be decided summarily.

COURT'S OPINIONS

[14] Evaluating both sides submissions and with reference to the affidavit of Lee Kwok Kee, Terrence dated 14 April 2003, the defendant's affidavit in reply dated 13 May 2003, the plaintiff's second affidavit dated 6 June 2003 all filed herein, I am of the view that the learned deputy registrar had decided correctly for allowing the summary judgment to be entered.

[15] As such, I decide to maintain the order entering the summary judgment previously made by the learned deputy registrar on 24 October 2005 and dismiss the defendant's appeal herein with costs.

THE LAW

[16] In every application sought in the High Court for summary judgment, O 14 r 1 of the Rules of the High Court 1980 provides that:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

[17] In relation to this, it is pertinent to quote several cases usually referred to in the courts in every application for summary judgment.

[18] The case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 wherein Justice Gopal Sri Ram, inter alia, held to the effect that:

> The effect of O 14 is to shut the defendant from having its day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no bona fide triable issues.

[19] As mentioned above, it is clear that the court has to consider whether there are triable bona fide issues prior to allowing a summary judgment to be

entered and what is meant by triable issues is based on the judgment of Justice Mohamed Dzaiddin in *Syarikat Kerjasama Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225 that is:

> The issue is whether or not there is a triable defence. This simply means that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute as to the fact which is to be tried or any other circumstances show reasonable ground of a bona fide defence.
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> However in my opinion, this is essentially a case where the triability of the issue depends upon evidence as opposed to law. The facts and circumstances as deposed and found in the affidavits that therein are sufficient to settle the issue. Here I would adopt the statement in the judgment of Ackner LJ in *Banque de Paris de Nacy* to the following effect:
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> > It is of course trite law that O 14 proceedings are only to be decided by weighing the two affidavits. It is also trite law the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facio, give leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence.

[20] Herein, it is a trite law that there are several requirements needed to be fulfilled prior to allowing an order of summary judgment as held by the Federal Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 that is:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
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> (i) the defendant must have entered appearance;
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> (ii) the statement of claim must have been served on the defendant and
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
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> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If, however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

[21] In the present case, I found that the plaintiff has fulfilled the said prima facie requirements. As such, the burden now shifts to the defendant to

satisfy the court as to why judgment should not be given against the defendant. It is my opinion that, the issues raised by the defendant as his defence herein are not triable issues or good arguable defence that ought to be tried.

[22] Despite there are many issues raised by the defendant, I cannot find any evidence supporting the defendant's allegations against the plaintiff that is the plaintiff did authorise, ratify and approve the defendant to misappropriate the monies wrongfully encashed by the defendant for different purposes other than their original purpose.

[23] Herein, I agree with the plaintiff's submissions that it is unreasonable to allege that the plaintiff would approve and authorise, ratify or agree to something which does not in any way benefit the plaintiff but in fact would expose the plaintiff to the risk of being fined by the Customs Department.

[24] In addition, I would like to point out here that Terrence Lee and the plaintiff company, are separate legal entities of one another. This matter is very clear and as such, I am of the view that the defendant's submissions that Terrence Lee had knowledge of the defendant's actions and authorised or approved such payments are not relevant for the court to consider.

[25] I am also of the view that even though Terrence Lee had knowledge being the director of the plaintiff company, this cannot be imputed to the plaintiff.

[26] My view is in line with the two cases brought by the plaintiff to my attention whereby the said cases held that the knowledge of a fellow director cannot be imputed to the company as in the case of *Rex v Tay Thye Joo* [1933] MLJ 35 it was held that:

> I will go further and say that even if Mr Van der Lee had been a party to the frauds, so far from exonerating the accused, it would have made his crime worse as involving a conspiracy to defraud … The knowledge even of a director is not in law in the knowledge of the corporation even when his co-directors have remained in ignorance through their own negligence … For this purpose therefore of the charges against the accused the knowledge of Mr Van der Lee is quite immaterial.

[27] Similarly, it was held in *Belmont Finance Corp Ltd v William Furniture Ltd* [1979] 1 All ER 119, that:

> Belmont Finance Corporation Ltd was a victim of the alleged conspiracy and since the essence of the agreement of 3 October was to deprive it of a large part of its assets, the seventh and eighth defendants' knowledge that the agreement was illegal was not to be imputed to Belmont merely because those defendants were directors

of Belmont. Accordingly, because Belmont did not have the necessary knowledge of the agreement's illegality, it was not a party to the conspiracy.

[28] I found that the defendant admitted in para 9.6 the defendant's affidavit in reply filed on 16 May 2003 and para 9 the defendant's affidavit 2 dated 17 June 2003 that the defendant had deposited plaintiff's monies into the defendant's own personal account and the defendant had encashed plaintiff's cheques personally as in exh CISB-8.

[29] As such, based on the defendant's actions that were not authorised or approved by the plaintiff, I am of the view that the defendant had breached his fiduciary duties as a director in the plaintiff company and had caused conflict of interest in the course of plaintiff's businesses.

[30] Based on the above mentioned reasons, I decide that this appeal has no merits and as such, I dismiss the defendant's appeal with costs.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed